MAR 26 2001 (18) (20)

No. 00-596, 00-597

Supreme Court, U.S.
FILED
MAR 26 2001
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

LORILLARD TOBACCO CO., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL
OF MASSACHUSETTS,
Respondent.

ALTADIS U.S.A. INC., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL
OF MASSACHUSETTS,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

RANDAL R. MORRISON
ATTORNEY AT LAW
P.O. Box 421318
San Diego, CA 92142-1318
(858) 573-6101

March 26, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

1. Whether state regulations that restrict the permissible locations for tobacco advertising, but do not affect the federally mandated health warning for cigarettes, are preempted by the Federal Cigarette Labeling and Advertising Act.

2. Whether, under the First Amendment, regulations that merely restrict the display of publicly visible tobacco advertising in locations near schools and playgrounds are properly analyzed under the intermediate scrutiny test set forth in *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980), and, if so, whether the regulations satisfy that test.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1335, particularly § 1334(b), which states:

   No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

2. First Amendment to the U.S. Constitution, which states:

   Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

INTERESTS OF *AMICI CURIAE* [1]

The American Planning Association ("APA") is a nonprofit, educational research organization dedicated to advancing state and local land-use planning. APA has state chapters covering all 50 states, including a Massachusetts chapter with over 800 members. With more than 30,000 members, it is the oldest and largest organization in the United States devoted to fostering livable communities through comprehensive land use planning. Because its members serve government agencies and private parties, the APA seeks to preserve the proper role of government in protecting communities, and the children who live, attend

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs, and they filed a letter reflecting consent with the clerk.

schools and play in those communities, as well as constitutional protections for freedoms of speech and press.

For most communities, where virtually all local elected leaders strive to make their town "beautiful as well as healthy, spacious as well as clean," *Berman v. Parker*, 348 U.S. 26, 33 (1954), sign regulation is an important tool of zoning and planning, as "billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" *Metromedia v. San Diego*, 453 U.S. 490, 510 (1981). Since the vast majority of both on-site signs and off-site billboards display commercial advertising, any doctrinal change by this Court to elevate commercial speech to a higher level of First Amendment protection than that defined in *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980), could severely hobble local governmental efforts to preserve, protect and improve the appearance of the community.

STATEMENT OF THE CASE

The APA adopts the statement of the case set forth in respondent's brief.

SUMMARY OF ARGUMENT

The APA is deeply concerned about both the narrow and the broad issues presented in this case. The narrow issue is the ability of states and communities to shield children, when in the areas where they learn and play, from intrusive, manipulative images promoting the use of tobacco, a legally tolerated, highly addictive drug which is physically destructive both to users and others near them. The broader issue, urged by the tobacco companies and their friends in the advertising and retailing trades, is whether commercial speech should now receive equal or nearly equal protection with classical "core" speech—advocacy on the timeless topics of politics, religion, science, art, philosophy, moral and

ethical issues. On the narrow issue, the tobacco sellers brazenly proclaim that their economic and expression freedoms are more important than the health of children and society's need to reduce the devastating impact of tobacco addiction on public health and the public fisc. On the broader issue, the advertising interests entreat this Court to do nothing less than destroy the hierarchy of values, the foundation of this Court's First Amendment commercial speech jurisprudence. Such a move would not only trivialize the First Amendment, by granting the same constitutional dignity to sales pitches for plastic storage containers as to civil rights marches, it would also cheapen and demean the history, tradition, and the purpose of the First Amendment itself.

Both the narrow and the broad positions advocated by petitioners and their supporters should be rejected.

ARGUMENT

I. THE MASSACHUSETTS REGULATION IS NOT PREEMPTED BY THE FEDERAL ACT.

A. Most Federal Courts of Appeal Have Correctly Concluded That Congress Intended to Preempt Only Message Content, and Not Sign Location.

Four of the federal circuit courts of appeal have considered the question of whether the Federal Cigarette Labeling and Advertising Act ("FCLAA," 15 U.S.C. §§ 1331-1335) prevents state and local governments from regulating the location of tobacco signs. The first and fourth circuits concluded that while Congress intended to regulate *statements* concerning smoking and health, just as this Court concluded in *Cippolone v. Liggett Group*, 505 U.S. 504 (1992), it also left unrestrained the traditional rights of state and local governments to set rules about where signs may be displayed. *Consolidated Cigar v. Reilly*, 218 F.3d 30 (1st Cir., 2000), *Federation of Advertising Industry Representatives, Inc. v. Chicago*, 189 F.3d 633 (7th Cir.,

1999), *cert. den.*, 529 U.S. 1066 (2000) ("FAIR"), *Penn Advertising of Baltimore, Inc. v. Mayor and City Council*, 63 F.3d 1318 (4th Cir., 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir., 1996), *cert denied*, 520 U.S. 1204 (1997).

The Second Circuit's two cases on point illustrate the proper scope of federal preemption. In *Vango Media v. City of New York*, 34 F.3d 68 (2nd Cir., 1994), the court struck a New York City ordinance which required one public health message, defined as "pertaining to the health dangers of smoking or the health benefits of not smoking" for each four tobacco ads displayed, and required that 25% of such anti-tobacco ads be directed to the youth population. Since the regulation obviously concerned the content of smoking and health messages, it was held preempted. Yet, in *Greater New York Metropolitan Food Council, Inc., v. Giuliani*, 195 F.3d 100 (2nd Cir., 1999), *cert. den.*, 529 U.S. 1066 (2000), the same court upheld regulations prohibiting most tobacco billboards within 1,000 feet of places where children congregate.

The lone exception to this pattern is the Ninth Circuit, which refused to follow its fellow circuits and held that FCLAA preempted both message regulation and sign location. *Lindsey v. Tacoma-Pierce County Health Dept.*, 195 F.3d 1065 (9th Cir., 1999), amended 203 F.3d 1150 (2000).

B. This Court's *Cipplone* Holding, That Congress Preempted Only Cautionary Statements on Labels and Advertisements, Controls the Preemption Issue in This Case.

The intent of Congress is the touchstone of preemption analysis. That intent may be explicitly stated in the statute or implied in its structure and purpose. *Cippolone v. Liggett Group*, 505 U.S. 504, 516 (1992).

Congress explicitly stated its intent

> to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health whereby (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C.§ 1331.

Reading the FCLAA as a whole, it is obvious that Congress was focused on the message content of tobacco advertising and labeling. This is clear from § 1333, which spells out in great detail the text and visual format of the required warnings. In *Cippolone, supra,* 505 U.S. at 517, this Court concluded that the preemptive scope of the FCLAA, both the 1965 and the 1969 versions, is governed "entirely by the express language of § 5 of each Act," and held:

> Thus, on their face, these provisions merely prohibited state and federal rulemaking bodies from mandating *particular cautionary statements* on cigarette labels (§ 5(a)) or in cigarette advertisements (§ 5(b)).

Cippolone, supra, 505 U.S. at 518 (1992) (italic added). The Court also noted that this construction was required by the presumption against preemption of state police power regulations. *Ibid.* Billboard regulations are within the state police power. *Metromedia v. San Diego,* 453 U.S. 490, 498 n.7 (1981).

Notably, Congress imposed particular warning messages for billboard ads, § 1333(a)(3), but remained silent on the typical issues of local billboard control under the zoning and police powers, such as spacing, size, location, and illumination. Congress was obviously familiar with these elements of billboard regulation at the time the FCLAA was first adopted, since most of them are addressed in the Highway Beautification Act, 23 U.S.C. § 131, passed only three months after the original version of the FCLAA.

Congress clearly had the ability to restrict tobacco advertising by the medium as well as the message, for it forbade such promotion on any electronic medium subject to F.C.C. jurisdiction, 15 U.S.C § 1335. *Capital Broadcasting v. Mitchell*, 333 F.Supp. 582 (DDC, 1971) *aff'd mem. sub nom. Capital Broadcasting v. Acting Attorney General*, 405 U.S. 1000 (1972). The fact that Congress ignored all other media in the FCLAA reveals an intention not to preempt regulation of non-electronic media by other branches and levels of government.

The Seventh Circuit's analysis of the preemption question informs the legislative history:

> The Senate Report refers to § 5(b) as "narrowly phrased" and not intended to touch state authority over sales to minors, taxation, indoor smoking, or "similar police regulations." S. Rep. No. 566, 91st Cong., 2d Sess. (1969) *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663.

Federation of Advertising Industry Representatives v. City of Chicago, 189 F.3d 633, 638 (7th Cir., 1999).

Reading the FCLAA in terms of the "structure and purpose of the statute as a whole," *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), it is inescapable that Congress intended to preempt only message content of tobacco advertising *statements*, and to leave billboard location requirements in the discretion of state and local legislators.

II. THE MASSACHUSETTS REGULATIONS ARE CONSTITUTIONAL UNDER *CENTRAL HUDSON.*

A. Although Most Tobacco Advertising Is Psychologically Deceptive and Arguably Advocates Illegal Activity, the First Prong of Central Hudson Is Not a Workable Basis for Concluding That Speech Promoting Tobacco Is Totally Without First Amendment Protection.

In *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 566 (1980) the Court established a four step test for determining the constitutionality of restrictions on commercial speech. The first prong of the *Central Hudson* test is to determine whether the commercial speech qualifies for any First Amendment protection at all; if the message concerns illegal activity or is misleading, then there is no protection. *Central Hudson*, *supra*, 447 U.S. at 566. Tobacco advertising in general has often been criticized as intentionally deceptive,[2] since the ads typically associate tobacco with unrealistic, idyllic images. However, short of a national, total ban on all cigarette advertising,[3] "deceptiveness" is not a workable basis on which to judge potential First Amendment protection for tobacco advertising on billboards, because the task of evaluating each separate

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[2] See, for example, World Health Organization Press Release of 4 November 1999 entitled, "Nowhere to Run, Nowhere to Hide - WHO Launches Ground Breaking Global Campaign to Counter Tobacco Industry Deception," available on the internet at www.health.fgov.be /WHI3/krant/ krantarch99/ kranttekstnov/ 991109m01who.htm, and White, *Merchants of Death-The American Tobacco Industry*

[3] *See* Polin, Article: *Argument for the Ban of Tobacco Advertising, a First Amendment Analysis*, 17 Hofstra L. R. 99 (1988); and Blasi and Monaghan, *The First Amendment and Cigarette Advertising*, 256 Journal of the American Medical Association 502, 506-07 (1986), advocating a complete ban on all cigarette advertising.

tobacco ad for deceptiveness would place an unwieldy administrative burden on government officials.

The "concerning illegal activity" element is also problematic, for while tobacco is legal for adults, it is illegal for minors in every state. As memorably stated by U.S. District Court Judge William B. Young in his trial court decision in this case:

> CIGARETTE ADVERTISING IS FUNCTIONAL PORNOGRAPHY. The metaphor is apt. Both are entirely legal. Both are spawned by and supported by multi-billion-dollar industries generating significant economic activity. While ostensibly clucking in disapproval, millions of adult Americans support each industry with considerable cash outlays yet seek to have the government teach our children to avoid that which so many of us eagerly purchase.

Lorillard v. Reilly, 84 F.Supp.2d 180, 182 (2000).

B. Massachusetts' Regulations Serve Several Governmental Interests Which Are at Least "Substantial."

The second prong of *Central Hudson* asks if the regulation serves a substantial governmental interest. Massachusetts' ban on tobacco advertising near schools and playgrounds serves several interests which are "substantial" or stronger. The most obvious is the protection of children from harmful influences, and to diminish the risk that they will be persuaded to break the law by smoking before they have the legal right to make that choice. This Court has long recognized child protection as a governmental and family interest of the highest order. *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 743 (1996) (the court has often found "compelling" the need to protect children from exposure to patently offensive sexual material); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 749, 750 (1978) (F.C.C. properly required broadcasters

to channel indecent broadcasts to times when children most likely would not be listening); *Ginsberg v. New York*, 390 U.S. 629 639-40 (1968) (state has an interest to see that children are safeguarded from abuses which might prevent their growth into free and independent well-developed men and citizens.)

In only two of the Court's commercial speech cases has protection of children been offered as a justification, namely the harm caused by exposure to ads for contraceptives. *Carey v. Population Services International*, 431 U.S. 678 (1977), *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60 (1983). In *Bolger*, which concerned a national ban on ads for contraceptives by mail order, the Court noted that the ads were not intrusive and that the danger of incidental exposure was small. 463 U.S. at 74. Not so here; it is the very intrusiveness of billboards that make them attractive to advertisers. Furthermore, both *Bolger* and *Carey* concerned products related to exercise of a constitutional right, procreative freedom. In contrast, there is no constitutional right to smoke or chew tobacco, or even to sell it. Cf. *Mugler v. Kansas*, 123 U.S. 623 (1887).

The Massachusetts regulations also serve the substantial governmental interests in public health and reducing the enormous costs of treating tobacco-related disease, by reducing the numbers of children and teens lured into the tobacco habit.

Since it is illegal to sell tobacco to minors in Massachusetts,[4] the regulations here also advance that policy. In *U.S. v. Edge Broadcasting*, 509 U.S. 418, 425 (1993) this Court upheld regulations forbidding broadcast advertising of gambling on the ground that the speech restriction served to avoid undermining state policy against gambling.

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[4] Mass. G. L. ch. 270, 6.

The second prong of *Central Hudson*, a substantial governmental interest, is thrice satisfied in this case.

C. The Regulations Directly Advance the Substantial Interests in Protecting Children and the Public Health System by Reducing the Number of Children and Teens Lured into Becoming New Smokers.

The tobacco industry has long known that the best source for new buyers / addicts is youth, especially alienated and rebellious young people who seek some symbol of independence from parental and societal authority figures.[5] It is no wonder the industry is fighting for their neighborhood billboards; now that tobacco ads are banned from television and radio, billboards near schools and playgrounds provide the best opportunity recruit new customers. The FDA has estimated that 3,000 teenagers start smoking each day;[6] that translates into roughly one million new users per year, most of whom will become life-long addicts, customers who, by the physical imperative of the addiction mechanism, effectively lose their free choice about purchasing the product.

Tobacco addiction and the diseases it causes or worsens impose an enormous burden on the public health care system. Just last term this Court noted the FDA's findings that:

> more than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease. . . . the only way to reduce the amount of tobacco-related illness and mortality was to reduce the level of addiction, a goal that could be

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[5] See *Hooked on Tobacco: The Teen Epidemic*, 60 Consumer Reps. 142, 143 (1995)

[6] Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,317 18 (1995) (proposed Aug. 11, 1995)

> accomplished only by preventing children and adolescents from starting to use tobacco. . . . 82% of adult smokers had their first cigarette before the age of 18, and more than half had already become regular smokers by that age. . . . children were beginning to smoke at a younger age, that the prevalence of youth smoking had recently increased, and that similar problems existed with respect to smokeless tobacco. . . [and that] if the number of children and adolescents who begin tobacco use can be substantially diminished, tobacco-related illness can be correspondingly reduced because data suggest that anyone who does not begin smoking in childhood or adolescence is unlikely ever to begin.

F.D.A. v. Brown and Williamson, 529 U.S. 120, 134 *et seq.* (2000).

Given the crucial role of advertising in luring new smokers, the undisputed fact of serious addiction caused by nicotine, and the devastating costs to the public health care system of treating tobacco-related illness, it is beyond question that reducing the number of new smokers by sharply limiting exposure of the enticing images to our most vulnerable citizens, serves substantial, even compelling, governmental interests.[7]

The third test of *Central Hudson*-advancing the substantial governmental interest—is met.

D. The Regulations Are Not More Extensive Than Necessary to Serve the Substantial Public Interests.

The tobacco companies argue that Massachusetts' ban on tobacco billboards within 1,000 feet of schools or

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[7] *See, generally*, Kessler: *A Question of Intent—A Great American Battle With a Deadly Industry*, New York, BBS Public Affairs (Perseus Books Group), 2001

playgrounds is excessive, and thus violates the final prong of *Central Hudson*, that the regulations be no more extensive than necessary, restated as "narrowly tailored to achieve the desired objective" in *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

It is debatable whether the exclusion zone should be 300 feet or 500 feet or 1,000 feet. However, this Court has long refrained from second guessing legislative judgments in this area, and should do so again here. *Metromedia v. San Diego,* 453 U.S. 490, 508, 509 (1981) (Court will not reject city's judgment to value on-site advertising over off-site); *Burson v. Freeman*, 504 U.S. 191, 210 (Court did not view the question of whether a 100-foot boundary could be more tightly drawn as being of constitutional dimension); *Hill v. Colorado*, 530 U.S. 703,120 S. Ct. 2480, 2495 (2000) (Court would accord a measure of deference to Colorado Legislature in adopting 8-foot interval).

The tobacco companies assert that the principles of *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), *Rubin v. Coors*, 514 U.S. 476 (1995), and *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) demand reversal here. Those cases are all distinguishable because the regulations totally banned purely factual information (alcohol pricing, alcohol content, prescription drug pricing) which adult consumers could use to make intelligent choices concerning products that were legal for them to buy. The regulations under scrutiny here do not impose a total ban, do not involve purely factual information, and are tailored to shield children from images enticing them to use a highly dangerous product which is illegal for them.

Nor may it be successfully argued that the tobacco companies are now foreclosed from presenting their message to adults. They remain free to purchase newspaper and magazine advertising, and frequently do so. They remain free to advertise on billboards which are not within 1,000 feet of schools or playgrounds.

> When young children are constantly and involuntarily bombarded with seductive messages appearing on neighborhood billboards that promote a lifelong addiction, not only is their health endangered, but their right to be free from having adult choices foisted upon them is not so subtly infringed.

Garner, Article: *Protecting Children From Joe Camel and His Friends: A New First Amendment Preemption Analysis of Tobacco Billboard Regulation*, 46 Emory L.J. 479, 486 (1997).

Beyond the "purely factual information" distinction, *44 Liquormart, Rubin* and *Virginia Pharmacy* also differ on the issue of intrusiveness of the medium. Children rarely if ever read the small print on beer labels, or ads in newspapers for prescription drugs or liquor. But giant, full color, illuminated billboards near schools and playgrounds are visually unavoidable; their purpose is to arrest the viewers' attention, if only for a few seconds, and to implant in an impressionable young mind a powerful and persuasive visual image. Nearly seventy years ago this Court noted the highly intrusive nature of strategically placed billboards and placards. In upholding Utah's total ban on tobacco billboards, the Court said:

> The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard.

Packer Corp. v. Utah, 285 U.S. 105, 110 (1932).

The Massachusetts regulations pass the final test of *Central Hudson*.

III. THIS CASE PRESENTS NO OCCASION FOR A MAJOR CHANGE TO THE COURT'S COMMERCIAL SPEECH DOCTRINE.

The advertising and retailing industries once again entreat this Court to abandon or seriously modify the commercial speech doctrine and the *Central Hudson* test. They make essentially the same arguments they presented only two terms ago in *Greater New Orleans Broadcasting Ass'n, Inc. v U.S.*, 527 U.S. 173 (1999). Once again, the Court's response should be:

> In this case, there is no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.

527 U.S. at 184.

A. Our Cultural Respect for the Challengers Who Changed the Course of History Requires a Higher Level of Protection for Ideological Speech.

At the core of the tobacco companies' constitutional call is the question: "Why should our messages have less constitutional protection than political or religious speech? Advertising matters more to the common people than the great debates, and advertising provides information about products and services, and improves the efficiency of the economic system." Even if we assume these points, they show only that commercial speech is entitled to some protection, not that it deserves equal treatment under the First Amendment. This Court's wisdom has long stressed that the First Amendment protects, first and foremost, expression on matters of politics, religion, philosophy, the arts, science and cultural matters; in short, the marketplace of ideas and the search for truth.

The primary item in the marketplace of ideas is criticism of the government. It is not natural for a government to allow open criticism of its policies, simply because criticism can lead to a loss of popular support and thus to a loss of power. This sentiment was expressed by Lord Holt in *Rex v. Tuchin*, Holt 424 (1704):

> If men should not be called upon to account for possessing the people with an ill opinion of the government, no government can subsist; for it is very necessary for every government, that the people should have a good opinion of it. . . . [Producing animosities as to the management of the government] has always been looked upon as a crime, and no government can be safe unless it be punished.

Quoted in Chafee, *Free Speech in the United States*, 180 (1941).

Our First Amendment turns Lord Holt's concept upside down, and converts the punishable crime of criticizing the government into a legal right of the first order.

Critics and dissidents of every kind find protection under the First Amendment. Even when we disagree with them, or find their messages revolting or incomprehensible, still we reserve a deep respect for idealists, protestors and crusaders whose quests for the more meaningful life, deeper insights into the mysteries of nature, more transcendent music, a more inspiring novel, or a more just political system leads them to decry and defy the norms of their time. Because some of the dissidents are eventually proven right, we hold in sometimes nervous reverence the right of all, crackpots and visionaries alike, to dissent from the established view. This profound respect for "your right to say it," is deep in our culture; our law reflects that cultural tradition, as it should.

> A special respect for individual liberty in the home has long been part of our culture and our law; that principle

> has special resonance when the government seeks to constrain a person's ability to speak there. Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8-by-11 inch sign expressing their political views.

Ladue v. Gilleo, 512 U.S. 43 (1994).

> [A] city council [may not] enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of city government.

R.A.V. v. St. Paul, 505 U.S. 377, 384 (1992).

B. This Court's Early Cases on Commercial Speech Clearly Laid the Foundation for Maintaining the Lower Level of Protection for Commercial Speech.

When this Court first extended First Amendment protection to advertising, it explained the reasons and social justifications for doing so. In *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) the Court explained the difference between ideological debate and expression on commercial matters:

> Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price."
>
> * * * *
>
> Our question is whether speech which does no more than propose a commercial transaction is so removed from any exposition of ideas, and from truth, science,

> morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government that it lacks all protection. Our answer is that it is not.

425 U.S. at 761, 762 (internal citations and punctuation omitted). In the same case Justice Stewart commented, in words since quoted in countless of lower court opinions:

> [T]here are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other. . . . Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decision-making, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. . . .
>
> Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement because of the 'information of potential interest and value' conveyed, rather than because of any direct contribution to the interchange of ideas.

425 U.S. at 779-780.

Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978), gave the Court another opportunity to recognize the "common sense and legal distinction" between speech proposing a commercial transaction and other varieties:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First

> Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

436 U.S. at 456.

In *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980) the Court announced the now-classic four part test for the constitutionality of restrictions on commercial speech. The lead opinion said:

> Apparently the [Stevens concurrence] opinion would accord full First Amendment protection to all promotional advertising that includes claims "relating to . . . questions frequently discussed and debated by our political leaders." Although this approach responds to the serious issues surrounding our national energy policy as raised in this case, we think it would blur further the line the Court has sought to draw in commercial speech cases. . . . This Court's decisions on commercial expression have rested on the premise that such speech, although meriting some protection, is of less constitutional moment than other forms of speech.

447 U.S. at 563 n.5.

Metromedia v. San Diego, 453 U.S. 490 (1981), was the Court's first (and, until this case, only) decision on advertising billboard regulation in the commercial speech era. Given the different levels of protection for commercial and noncommercial speech, the plurality analyzed the two classes separately. The restrictions on commercial speech were validated (the city was free to value on-site commercial advertising over off-site commercial), while the restrictions on noncommercial speech (interpreted to mean that the city was favoring certain noncommercial messages over others, as well as favoring commercial over noncommercial in some

locations), were found unconstitutional by the plurality.[8] These concepts form the foundation for virtually all sign regulations in the nation today; abandoning or corroding them now would wreak havoc on the ability of state and local governments to protect the appearance of their communities through effective sign control.

C. The Fact That the Regulations Affect Only Tobacco Signs Does Not Invoke Strict Scrutiny.

In the arena of ideological speech, standard First Amendment analysis first asks if the regulation is content based. If it is, then strict scrutiny applies. *Burson v. Freeman*, 504 U.S. 191 (1992). If it is content neutral, then the time, place and manner rule applies. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). However, this technique of raising of the standard of review for content based distinctions generally has not been followed in the commercial speech cases. Rather *Central Hudson* has been applied in a manner substantially Similar to the time, place & manner test, which does not require "least restrictive means." *Fox, supra*, 492 U.S. at 477. For example, in *Metromedia v. San Diego,* 453 U.S. 490 (1981), the plurality decision indicated that the city was free to value some commercial speech over other expression in the same category, based on both locational and content factors:

> Second, the city may believe that offsite advertising, with its *periodically changing content*, presents a more acute problem than does onsite advertising. Third, San Diego has obviously chosen to value one kind of

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[8] The commercial speech analysis was supported by five votes, the plurality of four plus Justice Stevens. Justices Brennan and Blackmun concurred with the plurality's result for the noncommercial speech restrictions, but not the plurality's reasoning; Brennan and Blackmun would have invalidated the entire ordinance. *See Ackerley Communications v. City of Somerville*, 878 F.2d 513, 517 n.8 (1st Cir., 1989).

> commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising. . . . The city has decided that in a limited instance—onsite commercial advertising—its interests should yield. We do not reject that judgment.

453 U.S. at 511. Justice Stevens concurred in this portion of the plurality decision, 453 U.S. at 541.

While the *Metromedia* plurality found the San Diego sign ordinance invalid as to noncommercial speech, it did so in part because certain signs-religious symbols, commemorative placques, time and temperature displays, temporary political signs, etc.-were exempted from the general ban on noncommercial speech. To the plurality, these exemptions showed an impermissible favoritism to certain noncommercial messages. 453 U.S. at 514. However, on this point all five of the other justices disagreed with the plurality's reasoning, and said in essence that the exceptions to the general ban should make no real difference in constitutional analysis because they did not invoke concerns protected by the First Amendment. Justice Stevens said the plurality's focus on the exceptions from the general led it to conclude the ordinance is unconstitutional because it did not abridge enough speech, 453 U.S. at 540, that the neutral exceptions for certain noncommercial signs did not pose a threat to any interests protected by the First Amendment because they did not show that the government is trying to influence public opinion or limit public debate on particular issues, 453 U.S. at 554, and that the city's allowance of additional communication during political campaigns was consistent with the interests the First Amendment was designed to protect, 453 U.S. at 555. Chief Justice Burger called the exceptions "negligible," 453 U.S. at 562, and said they did "not remotely endanger freedom of speech," 453 U.S. at 564. Justice Rehnquist said he was generally in agreement with the Chief Justice, and added that the limited exceptions were of the types which do not render a statute

unconstitutional; he would have treated the exception for political season billboards as self-limiting and having an effect on esthetics only during campaign season. Justices Brennan and Blackmun said that the city's few exceptions did not alter the overall character of the ordinance as a total ban, 453 U.S. at 526.[9]

The *Central Hudson* case itself also noted that the strict scrutiny rule for content based distinctions, which applies in other contexts, does not apply in the commercial speech arena. 447 U.S. at 564 n.6. Justice Stevens noted in his concurrence in *R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992), that the government may limit advertising for cigarettes but not cigars, citing to the very federal statute in issue in this case. He also stated:

> [O]ur decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment. [¶] This is true at every level of First Amendment law. In broadest terms, our entire First Amendment jurisprudence creates a regime based on the content of speech. The scope of the First Amendment is determined by the content of expressive activity. . . .
>
> Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.

505 U.S. 377, 420. 422

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[9] In the 3rd Circuit, the theory of "site relevance" has supplanted the *Metromedia* plurality's analysis of exemptions from a general ban. *Rappa v. New Castle County*, 18 F.3d 1043 (3rd Circ., 1994)

The Court has on several occasions reviewed categorical regulations under the *Central Hudson* analysis, without resorting to strict or exacting scrutiny. *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) and *Rubin v. Coors*, 514 U.S. 476 (1995) (liquor price advertising and alcohol content); *U.S. v. Edge Broadcasting*, 509 U.S. 418 (1993) and *Greater New Orleans Broadcasting Ass'n, Inc. v U.S.*, 527 U.S. 173 (1999) (broadcast advertising for gambling). These cases illustrate the flexibility of the *Central Hudson* test in adapting to a wide range of factual situations. *Fox, supra*. 492 U.S. at 476.

It is unnecessary and unwise to invoke strict scrutiny in commercial speech cases because *Central Hudson* allows a balancing of interests which considers the importance of the governmental interest, the degree to which the interest is served, and the tightness of the fit between means and ends. Invoking strict scrutiny for content based distinctions which are viewpoint neutral would destroy of the concept of the First Amendment's hierarchy of values; if any commercial speech were to be reviewed under strict scrutiny, then the entire concept of limited protection for commercial speech - and full protection for ideological speech - would be destroyed. The danger of "leveling" was pointed out by Justice Blackmun in his concurrence in *R.A.V. v. St. Paul*:

> If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech. If we are forbidden to categorize . . . we shall reduce protection across the board.

505 U.S. at 415.

D. The Court's Recent Commercial Speech Cases Confirm That Central Hudson Is a Workable Test, Flexible Enough to Adapt to a Wide Range of Factual Situations.

In *Greater New Orleans Broadcasting Ass'n, Inc. v U.S.*, 527 U.S. 173 (1999) the Court insightfully answered the advertising industry's relentless tirade against the *Central Hudson* test:

> The four parts of the *Central Hudson* test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three.

527 U.S. at 183, 184.

This concept—the integrated, interdependent nature of the four inquiries—is the key to maintaining *Central Hudson* as the controlling test in commercial speech cases, and to honoring the traditional hierarchy of values in First Amendment law.

E. A Significant Toughening of the *Central Hudson* Standard For Billboards Would Seriously Impede State and Local Government's Ability to Regulate Signs.

As an association of land use planners, the APA is most keenly concerned that this case might be used to raise the protection level for commercial speech and thus make it far more difficult for state and local governments to regulate signage. All across the nation, local policy makers and planners view sign regulation as one of their most effective tools for preserving and improving the appearance of their towns and cities.

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical,

> aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 33 (1954).

> Regardless of the label we give it, we are discussing a very simple and basic question: the authority of local government to protect its citizens' legitimate interests in traffic safety and the environment by eliminating distracting and ugly structures from its buildings and roadways, to define which billboards actually pose that danger, and to decide whether, in certain instances, the public's need for information outweighs the dangers perceived.

Metromedia v. San Diego, 453 U.S. 490, 557 (Burger, C.J., dissenting) (1981).

Signs often set the visual tone of an area and thus determine a visitor's all important "first impression." Sometimes the total signage can dominate or even define the image, as shown by the Las Vegas strip or Times Square in New York City. But most cities try to avoid the garishness of Las Vegas or Times Square; they want a reasonable balance between the advertising and identification needs of their local business community and the esthetic concerns of their environmental, arts, historic and scenic constituencies.

> For street graphics to communicate effectively, they must be neither too large nor too small, neither too numerous nor absent altogether, neither too garish nor too bland.

Mandelker and Ewald: *Street Graphics and the Law*, p. 33 (1988, Chicago: APA).

To preserve state and local governments' flexibility to regulate signs in harmony with the local situation, the principle that commercial speech enjoys only a limited level

of protection under the First Amendment must be sustained once again. The *Central Hudson* test, as refined and adapted in the many cases applying it, is a time proven method for analyzing commercial speech regulations.

CONCLUSION

The challenged regulations are not preempted because Congress intended to address only *statements* about smoking and health; other than the broadcast ban - which shows that Congress knew how to regulated media as well as message - Congress did not intend to address media regulation issues, such as location of signs.

Given the severe impact on personal and public health caused by tobacco use, the high susceptibility of children to alluring images promoting a product which is illegal for them, and the visually intrusive nature of billboards, the subject regulations should be sustained under *Central Hudson*.

The *Central Hudson* test, and the hierarchy of values concept on which it is based, must be maintained to preserve our cultural tradition of higher respect for ideological speech. The principles of that case are crucial to allowing state and local governments the flexibility they need to regulate signs to serve the local esthetic interests.

Respectfully submitted,

RANDAL R. MORRISON
ATTORNEY AT LAW
P.O. Box 421318
San Diego, CA 92142-1318
(858) 573-6101

March 26, 2001